Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., also known as SC CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH Z. FLEMING
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0517

Counsel for Petitioner

194499

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the domestic service exclusion under Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) is violated by the unionization of individuals employed in the domestic service of families or persons at their homes, when such families or persons live in condominiums, a form of home ownership recognized under Florida law.

2. Whether the National Labor Relations Board's assertion of jurisdiction over domestics employed directly by a non-profit condominium association is prohibited by Florida constitutional and statutory provisions and by the United States Constitutional provisions prohibiting violations of state sovereignty, the rights retained by the people, as well as takings and due process requirements.

LIST OF PARTIES

The parties below are listed in the caption. In addition, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union No. 390, AFL-CIO ("IBT"), initiated and appeared in the initial NLRB Representation proceedings. The IBT, however, did not continue to actively participate in this case thereafter.

CORPORATE DISCLOSURE STATEMENT

The Shore Club Condominium Association is a non-profit Florida corporation and operates as required by the provisions of the Florida Condominium law; it consists of those who are unit owners of the individual dwelling units, and the common spaces, in their condominium.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Shore Club Condominium Association, Inc. v. NLRB*, 400 F.3d 1336 (11th Cir. 2005). Appendix A at 1a-8a. The Eleventh Circuit affirmed the NLRB's Decision and Order, dated September 30, 2003. *In re Shore Club Condo. Ass'n, Inc.*, 340 NLRB No. 82 (N.L.R.B. Sep. 30, 2003). Appendix B at 9a-17a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, App. A at 1a-8a, was entered on February 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States of America:

Amendment V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment IX.

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Constitution of the State of Florida

Article VII, Section 6(a)

Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependant upon the owner, shall be exempt from taxation thereon . . . The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a lease-hold initially in excess of ninety-eight years.

The National Labor Relations Act
29 U.S.C. § 152(3) – Definitions

The term 'employee' . . . shall not include any individual employed . . . in the domestic service of any family or person at his home. . . .

Florida Statutes

§ 718.102, Florida Statutes (2004)

Purposes – The purpose of this chapter is: (1) To give statutory recognition to the condominium form of ownership of real property.

§ 718.111, Florida Statutes (2004)

The Association – (1) Corporate Entity – (a) The operation of the condominium shall be by the association, which must be a Florida corporation for profit or a Florida corporation not for profit . . . The owners of units shall be shareholders or members of the association. The officers and directors of the association have a fiduciary relationship to the unit owners. It is the intent of the Legislature that nothing in this paragraph shall be construed as providing for or removing a requirement of a fiduciary relationship between any manager employed by the association and the unit owners . . . * (c) A unit owner does not have any authority to act for the association by reason of being a unit owner.

§ 718.116, Florida Statutes (2004)

Assessments; liability; lien and priority; interest; collection. – (1)(a) A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner.

STATEMENT OF THE CASE

I. The Condominium Association.

Shore Club Condominium Association ("Condominium Association") is a not-for-profit condominium association made up of homeowners who, pursuant to the laws of the State of Florida, are able to own and retain individual homeowner legal rights in a vertical fashion, through a condominium ownership structure, which is located in Fort Lauderdale, Florida. App. A at 2a. A portion of the condominium property – with two towers over a parking lot pedestal in which there are homes stacked vertically, in what are known as condominium units – is west of the A1A highway. *Id.*; App. C at 19a. Another portion including a pool and recreational area is east of A1A, on the beach adjacent to the Atlantic Ocean (and is directly east, or across A1A, from the residential units of the homeowners in the towers). App. A at 2a. The owners have their home units in the two towers and have undivided ownership access to the common areas – which include:

A. the pedestal on the property which includes the grounds, the parking lot (which is built up and on top of which are parking spaces, open areas and structures) and the various common areas adjacent to and surrounding the buildings;

B. the elevators which go directly to the homeowners' doors on each floor (because of the way the elevators are set up so that there are no long hallways), as well as the catwalks along the outside of the buildings; and

C. the recreational area east across the street, which includes a pool, a structure and additional beachfront property. See App. A at 2a.

The condominium homeowners pay dues, security and assessments pursuant to Florida condominium law for the maintenance and security of their individual homes and common areas. § 718.116, Florida Statutes (2004).[1] The resident manager who works for a condominium association (and the Condominium Association's Resident Manager here) is subject to licensing and qualification requirements pursuant to State law because they are in positions of trust involving condominiums, which are considered home dwellings. The residential condominium units at issue here are entitled to and receive homestead exemptions, as well as other benefits that homeowners of residential homes have, because the State of Florida has chosen to establish the laws, so that homes can be vertically stacked and this type of homeownership can exist.

II. The Proceedings Before The NLRB.

The events leading to the filing of this petition began on April 3, 2003, when the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 390, AFL-CIO (IBT) petitioned the National Labor Relations Board (NLRB), seeking certification as the collective-bargaining representative of a unit of individuals in "domestic service" of families and

1. Judicial notice can be taken of the applicable legal requirements and provisions, which include Article VII, Section 6(a) of the Constitution of the State of Florida (homestead exemption for condominium owners) and Chapter 718, "Condominiums" of the Florida Statutes (and Parts I, II, III, IV, *et seq.* thereof).

persons at their homes in the Condominium Association. App. A at 2a. The Condominium Association argued that Section 2(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* precluded unionization of domestic employees working for a family or person at their home or dwelling. *Id.* The Regional Director disagreed and ultimately certified IBT as the exclusive collective-bargaining representative of the domestic employees. App. A at 2a-3a; App. C.

The Condominium Association refused IBT's bargaining request, following which IBT filed an unfair labor practice charge, alleging that the Condominium Association's failure to bargain had violated the NLRA. App. A at 3a. The NLRB's General Counsel issued a complaint, based on the Condominium Association's purported violation of Sections 8(a)(5) and (1) of the NLRA. *Id.* On September 30, 2003, the NLRB issued a Decision and Order, in which it granted General Counsel's motion for summary judgment and ordered the Condominium Association to bargain with IBT. *Id.* at 13a-16a.

III. The Court Of Appeals' Decision.

The Condominium Association filed a petition in the Eleventh Circuit Court of Appeals, pursuant to 29 U.S.C. § 160(f), seeking to set aside the NLRB's decision on the grounds that the NLRB had erred in failing to hold that the employees in question were domestic employees within the meaning of Section 2(3) of the NLRA. App. A at 3a-4a. On February 28, 2005, the Eleventh Circuit issued its opinion, denying the Condominium Association's petition and granting the NLRB's cross-petition to enforce the September 30, 2003 Decision and Order. *Id.* at 4a-8a. The Eleventh Circuit held that NLRB decisions distinguished domestic employees excluded from coverage by the NLRA who worked for single homeowners and single families, from those eligible for unionization who

worked in a condominium. *Id.* at 5a-8a. Because of its prior ruling, the Eleventh Circuit decided that employees who worked for a condominium association, rather than individual unit owners, would not be regarded as domestic employees. *Id.* at 6a-7a. The Court also found that its decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861 (2001) ("*Kentucky River*") did not require the Court to reverse its decision involving and affirming the NLRB jurisdiction over condominium employees. App. A at 7a. The Eleventh Circuit finally, rejected the other arguments, concluding that there was substantial evidence to support the NLRB's decisions that the individuals involved were not domestic employees within the meaning of Section 2(3) of the NLRA. *Id.* at 7a-8a.

REASONS FOR GRANTING THE PETITION

I. The Domestic Service Exclusion Under Section 2(3) Of The NLRA Precludes The Unionization Of Individuals Employed In The Domestic Service Of Families Or Persons At Their Homes, When Such Families Or Persons Live In Condominiums, A Form Of Home Ownership Recognized Under Florida Law.

The NRLB cannot circumvent the domestic service exclusion under Section 2(3) of the NLRA, 29 U.S.C. § 152(3), under which unions, such as IBT, are prohibited from representing anyone who is, as a matter of definition, employed "in the domestic service of any family or person at his home." 29 U.S.C. § 152(3). Condominiums are a form of real property. § 718.102, Florida Statutes (2004). Common ownership is fundamental to condominium organization and sustainability, particularly in the case of a non-profit condominium association. § 718.111, Florida Statutes (2004).

The Condominium Association is a group of homeowners who, as a matter of law, are able to directly employ individuals in domestic service of families and persons living in homes in a joint fashion (so that they could be vertically stacked). The NLRB has chosen to re-categorize this type of real property as a business to enable unionization of employees in the "domestic service of any family or person at his home" when such family or person lives in a condominium.

According to Florida constitutional and statutory law, homes may be horizontally organized in a block or vertically stacked in a condominium fashion. Therefore, individuals who are working in the homes for families or persons at residential homes in domestic service cannot be organized and represented by the IBT. A court's ruling to the contrary would destroy the concept of homeownership and convert it into a type of industrial relations situation, that would be inconsistent with rights under NLRA and rights inherent to homeownership. For instance, individual condominium homeowners have the ability to obtain homestead exemptions, when they choose to live in such a home and comply with the Constitutional requirements for homestead. They have other statutory rights, and obligations, which the State of Florida and other States can establish. *See, e.g.*, Article VII, Section 6(a) of the Constitution of the State of Florida (granting homestead exemptions to condominium owners).

The NLRA was not intended to extend into the homes of families or individuals. Congress excluded domestic service. Those who were very rich might have had many employees in domestic service, but that does not mean they were in commerce; the law enabling condominiums means owners

who do not possess the wealth of a Rockefeller[2] can have domestic employees in their homes, as they do in the instant case. As a matter of law, there is no difference between a residence on a lot and residential enclave, or condominium. Condominium homes provide a more attainable opportunity and efficiency for homeowners—they may combine living in a vertical neighborhood so their domestic employees can perform maintenance in common areas, work in their homes, and also provide for their security. There would be no public policy[3] reason to oppose this.

Initially, the NLRB did not find it had jurisdiction over condominiums. However, it was first faced with the need to exclude domestic employees from NLRA coverage in *Point*

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2. The fact that a lot of money can be spent on a "home" and its related open spaces does not subject the home to NLRA jurisdiction. *See* the biography of David Rockefeller, which illustrates the various domestics that he grew up with as a young boy at his family estate and then, later, was able to enjoy the benefits from, in his other various estates. DAVID ROCKEFELLER MEMOIRS, by David Rockefeller (Random House 2002), at pages 30-33; 483-485.

3. As a matter of public policy the NLRB should recognize that combinations and concerted activity are essentially not illegal and are provided for by law. However, exclusion of employees from unionization because they work in the domestic service is also the intent and the requirement of the NLRA. As a matter of public policy from a controlled or planned growth approach, it should be noted that density enabled by condominium living creates communities which are of value, as has been well recognized. *See*, *e.g.*, Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (The Modern Library 1993); at Chapter 11, 261-289 for "The need for concentration"; *see also* Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (North Point Press, New York 2000).

East Condominium Owners Association, Inc. and Service Employees International Union, Local #672, 193 N.L.R.B. 6 (1971). There the NLRB refused to allow a labor organization to organize those in the domestic service working for a condominium association. Subsequent cases, for reasons explained below, distinguished *Point East.* Then, by virtue of administrative and judicial rulings which erroneously overlooked statutory requirements, the NLRB perceived *Point East* as reversed, notwithstanding the distinctions and the dissents as noted in the following analysis of the relevant case law:

A. *Point East Condominium Owners Association, Inc. and Service Employees International Union, Local #672*, 193 N.L.R.B. 6 (1971), as noted, was the initial NLRB reported case involving domestic employees in a condominium, such as the one here. However, it involved an exponentially larger condominium of 1266 privately owned homeowners units as compared to 192 homeowner units here.. The NLRB avoided addressing the issue of domestics, by ruling that it would not take jurisdiction. It accepted the condominium association's argument that the domestics' operations did not "satisfy any applicable established jurisdictional standard." It found that the relationship between a condominium association and the owners was:

> . . . an instrumentality through which the owners have merged together to share collectively in meeting the expenses entailed in maintaining the upkeep and appearance of their property. Accordingly as we are not satisfied, on the record before us, that the relationship between, the Employer and the unit owners is one of doing business, and as the commerce data fails to satisfy

> any other appropriate Board standard, we shall, at this time, decline to assert jurisdiction and shall dismiss the petition.

See Point East Condominium Owners Association, Inc., supra. The Petition before the Court concerns the NLRB's and the Eleventh Circuit's disregard for the precedent set in *Point East.*

B. In *Leisure Village Association, Inc. and Local 806, International Brotherhood of Teamsters*, 236 N.L.R.B. 102 (1978), an advisory opinion was sought because the IBT was apparently seeking representation of an association's employees. The NLRB cited *Point East* as confirming a lack of jurisdiction over condominiums and dismissed a petition for an advisory opinion. Again, the NLRB and the Eleventh Circuit have ignored this precedent in the instant case before the Court.

C. The next case upon which the NLRB and the Eleventh Circuit rely upon is *30 Sutton Place Corporation and Local 32B-32J, Service Employees International Union, AFL-CIO*, 240 N.L.R.B. 752 (1979). *30 Sutton Place* involved different circumstances. The employer there wanted a union and stipulated to a record to assist unionization. The employer was supported by a multi-employer for-profit bargaining association, which represented apartments and buildings, including the co-ops. The multi-employer association, known as the Realty Advisory Board on Labor Relations, already represented 1,700 buildings and had 475 co-ops (and perhaps some condominium buildings included). The multi-employer bargaining association wanted the union to be able to bargain with it, as part of its business. However, the NLRB Regional Director dismissed the Petition due to lack of jurisdiction

based on precedent set in *Point East*, *supra*. As a result, the union and the employer in *30 Sutton Place Corporation* jointly sought review. All parties argued that the NLRB had jurisdiction. The association argued that its for-profit status required it to be treated as any other business. Despite precedent in *Point East* and *Leisure Village Association, Inc. and Local 806, International Brotherhood of Teamsters*, 236 N.L.R.B. 102 (1978), the NLRB took jurisdiction over the for-profit entity.

D. In *Ankh Services, Inc. and Local 50, Service Employees International Union, AFL-CIO-CLC*, 243 N.L.R.B. 478 (1979), relied on here by the NLRB and the Eleventh Circuit, the NLRB also dealt with a private for-profit corporation. That corporation provided in-home service workers under a state funded arrangement. This arrangement was used by the employer to challenge the involvement of a governmental entity which was a "public subdivision exempt under Section 2(2) of the Act". The corporation argued that its in-home service workers were in the domestic service pursuant to Section 2(3) of the Act. The NLRB noted that the homeowners involved were not paying for the domestic services. Furthermore, the NLRB found that only a for-profit employer was involved and it billed the State. The homeowners paid nothing. The service workers were not employed by the homeowners, nor dealing with them directly or indirectly. The NLRB found that these State-funded employees were not individuals employed in the domestic service of any family or person at his home.

E. In *Imperial House Condominium, Inc. and Hotel, Motel, Restaurant & Hi-Rise, Employees & Bartenders Union Local 355, AFL-CIO*, 279 N.L.R.B. 1225 (1986), relied on by the NLRB and the Eleventh Circuit, a building had been

converted to condominiums, but a question remained about the continuing status of the union after the conversion. The previous building owner was in the process of negotiating a new union contract when the condominium conversion occurred. The condominium owners argue that the union and its contract with the previous owners was eliminated upon conversion. The NLRB ruled against the condominium owners based on the case law above and dismissed the applicability of *Point East* and the dissent's reliance thereon. The NLRB compared the condominium involved there to athletic clubs, country clubs and agricultural co-ops and found that this justified the NLRB assuming jurisdiction over the condominium. The Board relied primarily on *30 Sutton Place*, a case inapposite to the facts in *Imperial House*. Chairman Dotson and Member Johansen, in their dissent, noted that *Point East* was controlling:

> Contrary to our colleagues, we would overrule 30 Sutton Place, 240 NLRB 752 (1979), and decline to assert jurisdiction over residential condominiums as was the Board's practice before 1979. *See Point East Condominium Owners Assn.*, 193 NLRB 6 (1971).
>
> Prior to 1979 the Board maintained no jurisdictional standards for residential condominiums and, in fact, had specifically declined to assert jurisdiction over them. *Point East, supra.* The rationale for declining to assert jurisdiction rested on the unique nature of condominiums. Thus, a condominium is composed of a group of individually owned dwellings and jointly owned common areas. In such a relationship, the owners do not provide a product or services to persons other than themselves. Instead, the condominium is a "creature to unit owners" serving

only to allow individual home owners "to share collectively in meeting the expenses entailed in maintaining the upkeep and appearance of their property." Point East, supra. Accordingly, the Board deemed it inappropriate to assert jurisdiction over such entities.

The dissent also noted:

> Because condominiums represent a form of home ownership, rather than a means of doing business, we believe that in 30 Sutton Place the Board also erred in rejecting any analogy between private home owners and condominiums. The fact that condominium owners act collectively does not belie the central fact that their only collective action is their purchase of maintenance and services for their homes and dwellings. Thus, in terms of the specific actions they undertake, condominiums act no differently from individual homeowners.
>
> Because we find apt the analogy between individual home owners and condominium owners, we also find relevant the "domestic employee" exclusion. In so doing, we do not argue that condominium employees are "domestic employees." Rather, we find the exclusion important because it reflects the desire of Congress to insulate private home owners from the requirements and obligations of the Act. In this regard, we simply do not believe that Congress intended to extend the Board's authority to cover efforts, individual or collective, to obtain private home maintenance, repair, or related services.

> In conclusion, we wish to stress that our view is not that the Act precludes assertion of jurisdiction over condominiums. Rather, our experience and our review of the Act's fundamental purposes and objectives convince us that the Board's limited resources will be better utilized by concentrating our efforts on actual business enterprises rather than by seeking to regulate the efforts of individual homeowners to pool their resources in order to secure home and property maintenance service for themselves. Because we believe the decision in Point East better reflects these beliefs and objectives, we would return to that rule.

F. In *NLRB v. Imperial House Condominium, Inc.*, 831 F.2d 999 (11th Cir. 1987), the Eleventh Circuit affirmed the NLRB's decision in *Imperial House Condominium, Inc., supra*, because it found that agency expertise controlled. The court's ruling was based on a unique fact pattern: the labor union involved was already representing employees and, while bargaining for a new contract, the building was converted into a condominium. It was in this specific context that the aforementioned issues were raised. Though the court recognized that the condominium association had stopped bargaining, the court found that the NLRB's expertise and resulting decision was determinative. *See Imperial House Condominium, Inc.*, 831 F.2d at 1005. It concluded that "[b]ecause of the Board's 'special competence' in the field of labor relations, its interpretation of the Act is accorded substantial deference." *Id.* (citation omitted.) The court ignored the dissent in the NLRB's *Imperial House Condominium, Inc.* decision, the precedent in *Point East* decision, and the NLRA exclusion of domestic employees.

G. Finally, the NLRB also relied on *Riverdale Manor Owners Corp.*, 311 NLRB 1094 n.1 (1993); but, that case is illustrative of the erroneous analysis. There, Riverdale Manor Owners Corp. and Zev Pollak Co., jointly controlled and directed by Zev Pollack, the proprietor and president of the board and majority stockholder, operated a "rental facility consisting of 73 rental units." No condominium association or individual ownership of units was involved. Only a profit-making operation of a rental facility was involved. While the Regional Director and the NLRB relied on footnote 1, in that case, footnote 1 merely referred to the NLRB's approach of aggregating gross revenues from residential buildings managed by an employer; and it did not in any way address the question of whether individuals in domestic service were excluded under the NLRA.

While the Eleventh Circuit was deferential, other Circuits have not provided such deference to agencies such as the NLRB. *See Bethlehem Steel Corp. v. U.S. E.P.A.*, 723 F.2d 1303, 1309 (7th Cir. 1983), noting that a Court's deference to an agency's statutory interpretation is based on the principal that such matters

> are more fully understood by specialist agencies . . . And where a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. An agency that may be dominated by one faction in the legislative struggle that led to the enactment of a compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of another faction. The court must enforce the compromise,

> not the maximum position of one of the interest groups among which the compromise was struck.

See also remarks of Robert J. Batista, Chairman, National Labor Relations Board, at the 58th NYU Annual Conference on Labor (May 20, 2005), (BNA Daily Labor Report, No. 98, Monday, May 23, 2005, at page 6) (noting that "it is not surprising that Board law changes from time to time. The Board's freedom to act within parameters means that different Boards will act in different ways"). *Cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 55 S. Ct. 837, 852 (1935) (J. Cardozo, concurring) ("The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440, 55 S. Ct. 83, 79 L. Ed. 645 (1935). This Court has held that delegation may be unlawful though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co. v. Ryan, supra.*").

Recently, this Court in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861 (2001) rejected the NLRB's result-oriented approach, which ignored statutory definitions (such as occurred with the definition of the domestic exclusion under Section 2 of the NLRA, in the NLRB's departure from *Point East*). The NLRB, in *Kentucky River*, concluded that nurses were not supervisors under the NRLA, although they directed others and used independent judgment. This Court stated that "[t]here is no apparent textual justification for this asymmetrical limitation." *Kentucky*, 532 U.S. at 717. This Court noted that the NLRB

– by its refusal to exclude supervisors from a unit by ignoring the NLRA definition excluding supervisors from coverage – had attempted to insert a type of "startling categorical exclusion into statutory text." *Id. See also*, *Kentucky*, 532 U.S. at 714 (citing *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 481, 121 S. Ct. 903 (2001) ("[T]he agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear")). The Court found the NLRB's interpretation was without justification and "particularly troubling". *Kentucky River*, 532 U.S. at 716.

Here too the interpretation of the NLRB should focus on the statutory requirements and, at the minimum, follow the *Point East* approach to comply with the NLRA.

II. The NRLB's Assertion Of Jurisdiction Over Domestics Employed Directly By A Non-Profit Condominium Association Is Prohibited By Florida Constitutional And Statutory Provisions And By The United States' Constitutional Provisions.

This Court in *Kentucky River*, *supra*, concluded that the NLRB cannot ignore the language of the statute, as it had tried to do with exclusions for supervisors in the nursing industry. The NLRB cannot ignore the exclusion of domestic employees. This is not only because of the NLRA, but because of the basic concepts of the Constitution, starting with the premise of the Constitution regarding State sovereignty and federalism. Florida by its Constitution and statutes enables a residential home to use a condominium legal structure, so that homes can be legally stacked, or established in a residential condominium association of owners. Ignoring Florida law by taking jurisdiction over those in domestic service, violates State sovereignty. This was

recently confirmed by the majority opinion of Justice Thomas in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002). Justice Thomas noted that states had "residuary and inviolable sovereignty" and that:

> Dual sovereignty is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union "with their sovereignty intact." An integral component of that "residuary and inviolable sovereignty" retained by the States is their immunity from private suits. Reflecting the widespread understanding at the time the Constitution was drafted, Alexander Hamilton explained,
>
> > It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. . . .
>
> States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government. Nevertheless, the Convention did not disturb States' immunity from private suits, thus

> firmly enshrining this principle in our constitutional framework. "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity."[4]

Justice Thomas also stated that the preeminent purpose of state sovereign immunity is to accord states the dignity consistent with their status as sovereign entities:

> The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. . . . [t]he founding generation thought it "neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons." . . . The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.[5]

The federal agency's jurisdiction was invalidated by the Supreme Court for reasons explained in Justice Thomas' majority decision.[6] Thus, if the interpretation argued for here were to take effect, the sovereignty of the State of Florida – in terms of its interests in protecting its residents – would be

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4. *FMC v. South Carolina*, 122 S. Ct. at 1870 (citations omitted).

5. *FMC v. South Carolina*, 122 S. Ct. at 1874.

6. *FMC v. South Carolina*, 122 S. Ct. at 1868.

destroyed. This is not only because condominiums, as noted above, are provided for under State statute but, in the case of Florida, condominiums are even recognized in the Florida Constitution as enabling a family or person to have homeownership in a condominium to qualify for homestead exemption. *See* Article VII, Section 6 of the Constitution of the State of Florida which provides for Homestead exemptions, in subsection (a), for "every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner" and exempts them from taxation up to an amount of $5,000.00. The Florida Constitution states that "the real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, ..." Thus, ignoring the United States Constitutional prohibition against destroying State sovereignty here would mean that the NLRB would employ an interpretation contrary to federal Constitutional guarantees. The Ninth and Tenth Amendments also preclude the denial of the reserved rights which the NLRB's incorrect approach attempts to enable here.

In addition, the IBT, if it were to represent the owners of such residential units in bargaining, could be in the following situation:

1. The IBT could demand money, which could be the "taking" of property of the homeowners, because the NLRA would be interpreted to allow a strike to withhold services, in order to obtain money from the homeowners, in a way that would be inconsistent with the Fifth Amendment to the United States Constitution. *See, e.g., Lingle v. Chevron, U.S.A., Inc.*, No. 04-163 (U.S. May 23, 2005).

2. By virtue of the NLRA, the IBT could strike, and shutdown the ability of someone to live in their home, which in addition to violating the other Constitutional rights could be a denial of due process, in violation of the Fifth Amendment (insofar as the NLRB would be authorizing such a result). *Cf. Mathews v Eldridge*, 424 U.S. 319 (1976), as well as the Ninth and Tenth Amendments.

In addition to the Constitutional and statutory restrictions, there is no point in promoting the IBT effort to organize the condominium residences involved here, because of any arguable public policy. The NLRA specifically prohibits this result, by excluding domestic employees. Thus, even if the NLRB were "mission-oriented" and wanted to expand unions in America, the controlling statute would prohibit the result. If Congress decides that it wants to change the law, then Congress may legislate to do so; but, the NLRB cannot do so by erroneous rulings. *See Kentucky River, supra.* In addition, there is no public policy that would suggest that the NLRB needs to impose collective bargaining agreements and the approach that is used for trade and business unionization. Assuming for the purpose of argument that the NLRA, in other sections, promotes unions, to do so in homes here would constitute, as noted, a taking and denial of property rights and would improperly put homeownership in jeopardy. In addition to express exclusion in the NLRA of domestics, the following should be considered (in addition to the Constitutional and statutory legal prohibitions):

1. "Putting America's houses in order" is not going to be achieved by having unions organize homeowners. The results as can be seen from the recent experiences in the airline industry, which show that effective unionization will drive up costs. *See* Micheline Maynard, *More Than Money's*

at Stake in Votes By Airline Unions, NEW YORK TIMES, Tues., April 29, 2003, page C1, col. 5 (noting the inflationary union work rules and practices). In addition, unlike the airline industry, there is no way to have a non-union competitor home, or residence. People could not clone themselves, or have comparative shopping, or move their condominium ownership away. The homes involved here are also tied together by law, and are assessed for the expenses of maintenance and security. Imagine bargaining with the IBT and indicating that there were problems, and having the IBT ask for financial information – because of the nature of the statement by someone acting on behalf of the homeowners to the effect that they could not afford to pay more. Would individual IRS tax returns have to be turned over, since the money for the domestic employees involved here comes right from the pockets of the homeowners? Would how deep, or shallow, those pockets are then be relevant?

2. Does the NLRB have the right to change land use policy and eliminate the advantages of living in a condominium, contrary not only to environmental planning and land use adopted by states and local governments but also, contrary to the Constitutional guarantees and statutory guarantees of the State of Florida related to real property ownership? *See also* Justice Douglas' opinion in *City of Memphis v. N.T. Green*, 451 U.S. 100, 127 (1981) (regarding the interest in protection and tranquility and noting "the accepted view that a man's home is his castle").

Since the National Labor Relations Act prohibits the unionization of those who are working for an individual or a family in their home and Florida's constitutional and statutory provisions have created a form of property ownership which includes a condominium to enable homeowners to live in condominiums, the decision below is incorrect.

CONCLUSION

For all the foregoing reasons, Petitioner Condominium Association requests that the Supreme Court grant a review of this matter.

Respectfully submitted,

JOSEPH Z. FLEMING
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0517

Counsel for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 28, 2005

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-15501

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., a.k.a. SC CONDOMINIUM ASSOCIATION, INC.,

Petitioner-Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

(February 28, 2005)

Before CARNES and COX, Circuit Judges, and STROM*, District Judge.

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

Appendix A

STROM, District Judge:

This case is before the Court on the petition of the Shore Club Condominium Association, Inc. ("the Association"), to review and set aside an order of the National Labor Relations Board ("the Board"). The Association, a nonprofit Florida corporation, provides maintenance and security services to the owners and residents of the Shore Club Condominium. The condominium property consists of a recreational area and two residential towers in Fort Lauderdale, Florida. The two residential towers, which contain 192 units and an above-ground garage below each tower, are located at 1901 and 1905 North Ocean Drive. The recreational area, which includes beach property, a recreational building, and a pool, is located at 1912 North Ocean Drive. The Association employs a lead maintenance employee and four other maintenance employees, including one who functions primarily as a painter, and three cleaners who perform janitorial functions.

On April 3, 2003, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 390, AFL-CIO ("the Union") filed a petition with the Board seeking certification as the collective-bargaining representative of the Association's maintenance employees. The Association opposed the Union's petition, claiming that the unit sought was inappropriate because it consisted of domestic employees, who are excluded by Section 2(3) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 151 *et seq.* Following an evidentiary hearing on April 17, 2003, the Regional Director issued a decision finding the following unit

appropriate for the purpose of collective bargaining: "All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by the [Association] at its facility in Ft. Lauderdale, Florida, excluding all office employees, security employees, guards and supervisors as defined in the Act." The Regional Director then conducted a secret-ballot election in the specified unit on June 11, 2003, in which there was a 5-0 vote in favor of representation by the Union. Thus, on July 22, 2003, the Regional Director certified the Union as the exclusive collective-bargaining representative of the Association's maintenance employees.

Following the certification, the Union requested bargaining and the Association refused. The Union then filed an unfair labor practice charge, asserting that the Association's refusal to bargain violated the Act. Upon an investigation, the Board's General Counsel issued a complaint alleging that the Association violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Association filed an answer admitting its refusal to bargain, but arguing that the Board had improperly certified the Union. On September 30, 2003, the Board granted the General Counsel's motion for summary judgment and ordered the Association to bargain with the Union. The Board held that the employees in question were not domestic employees within the meaning of Section 2(3) of the Act, and therefore the Association violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The Association filed a petition for review on October 29, 2003, arguing that the Board erred when it failed to hold

that the unit employees were domestic employees excluded from the Act's coverage by Section 2(3). The Board filed a cross-application for enforcement of the Board's order on November 25, 2003. We find that the Association's position is contrary to established Eleventh Circuit precedent and hold that the Board's order must be enforced.

Standard of Review

The Board's finding of an unfair labor practice "must be upheld if it is based upon substantial evidence contained in the record taken as a whole, and based upon reasonable inferences drawn from the facts as found." *NLRB. v. Imperial House Condominium, Inc.,* 831 F.2d 999, 1006 (11th Cir.1987). "Because of the Board's 'special competence' in the field of labor relations, its interpretation of the Act is accorded substantial deference." *Id.* at 1005, citing *Pattern Makers' League of North America v. NLRB,* 473 U.S. 95, 100, 105 S.Ct. 3064, 3068, 87 L.Ed.2d 68 (1985). "[T]he remedy chosen by the Board must 'be given special respect by reviewing courts.' " *Imperial House,* 831 F.2d at 1006, citing *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969). "So long as the Board has made a plausible inference from the record evidence, we will not overturn its determinations, even if we would have made different findings upon a *de novo* review of the evidence." *Cooper/T. Smith, Inc. v. NLRB,* 177 F.3d 1259, 1261 (11th Cir.1999).

Appendix A

Discussion

Section 2(3) of the Act excludes from the definition of "employee" anyone employed "in the domestic service of any family or person at his home." 29 U.S.C. § 152(3). The Association argues that the employees at issue in this case are "domestic" because they work for the owners in their individual home units, and in the common areas, which the Association claims are owned by the individual unit owners. The Association employs a total of five employees who perform various maintenance and cleaning services. The lead maintenance employee is responsible for the installation, repair and maintenance of various equipment in the common areas of the buildings, but his job occasionally requires him to enter an individual resident's unit to perform maintenance on air conditioning drain lines and condensation lines. The Association also employs a full-time painter who maintains the paint on the exterior and in the common areas of the buildings. The painter performs some additional painting for individual residents within their units, but he does that work on his own time and is compensated by the resident rather than the Association. Finally, the Association employs three cleaners that are responsible for cleaning the common areas, such as the elevators, lobbies, catwalks and stairwells, and collecting newspapers from the trash bin for recycling.

The Association argues that the Board erred in finding that these employees are not "domestic" employees within the meaning of Section 2(3) of the Act. However, in *30 Sutton*

Place Corp., 240 NLRB 752, 753 n.6 (1979), the Board held:

> [T]here is a substantial difference between employment by a single homeowner and employment by a cooperative or condominium entity. In the first instance, an individual and personal relationship is created between the homeowner and the employee; in the second instance, the employee's relationship with the employer, the cooperative or condominium entity, is no different from that of an employee performing similar work for an apartment house or office building entrepreneur. "Domestic service implies employment on an individual and personal basis and cannot be enlarged to include a maintenance crew or clerical staff for a [47] unit housing complex." *Success Apartments, Inc. v. UAW, Local 376,* 99 LRRM 3169, 3171 (1978).

See also *Ankh Services, Inc.*, 243 NLRB 478 (1979).

Subsequently, in *NLRB v. Imperial House Condominium, Inc.*, this Court followed the Board's decisions in *30 Sutton Place* and *Ankh,* in rejecting a Condominium's contention that employees involved in housekeeping activities were exempt from the Act's coverage as "domestic" employees under Section 2(3):

> It is clear that the Condominium's housekeepers are not employed by the unit owners in whose home the housekeepers provide their services.

> Although the housekeepers do render services to the unit owners, they nevertheless perform these services on behalf of and are clearly employed by the Condominium, a Florida corporation.

831 F.2d 999, 1005 (11th Cir.1987). Based on this Court's decision in *Imperial House,* we believe there is substantial evidence to support the Board's finding that the employees at issue in this case are employed by the Association, rather than the individual unit owners. Thus, the Board was warranted in holding that these employees are not exempt from the Act because they are not domestic employees within the meaning of Section 2(3).

The Association argues that the United States Supreme Court's decision in *NLRB. v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 121 S.Ct. 1861, 149 L.Ed.2d 939 (2001), requires that we reverse our holding in *Imperial House.* The Association makes a strong effort to persuade us that the employees at issue in this case should be considered domestic employees who are exempt from the Act. However, we do not believe that the Supreme Court's decision in *Kentucky River* requires reversal of the *Imperial House* decision.

The Association makes additional arguments under Florida law and the United States Constitution. Specifically, the Association argues that applying the Act to its employees would destroy the concepts of state sovereignty and federalism, and would violate the United States Constitution in the following ways: (1) if the Union demanded money, this could be a "taking" of the unit owners' property in

violation of the Fifth Amendment; (2) if the Union demanded information, this could be an unlawful search in violation of the Fourth Amendment; (3) by striking, the Union could prevent someone from living in their own home, which would constitute a violation of due process; and (4) the Union could interfere with the rights of the unit owners in a manner that would be inconsistent with due process and equal protection. The Court has considered the Association's arguments, and finds them without merit.

Finally, the Association claims that it was prejudiced by rulings of the hearing officer which precluded it from introducing certain evidence at the hearing. For instance, the Association claims that it should have been allowed to question a Union representative about whether he lived in a condominium, and that it should have been allowed to introduce Exhibit 7 in its entirety into evidence. Upon consideration of these arguments, the Court finds that the rulings were within the discretion of the hearing officer, and do not constitute prejudicial error. Thus, the Association's arguments on this issue are also rejected.

Conclusion

We conclude that there is substantial evidence to support the Board's finding that the employees at issue in this case are not exempt from the Act because they are not domestic employees within the meaning of Section 2(3). Moreover, we reject the Association's constitutional and evidentiary arguments. Therefore, the Association's petition to set aside the Board's order is denied, and the Board's cross-application for enforcement of the order is GRANTED.

APPENDIX B — DECISION OF THE NLRB FILED SEPTEMBER 30, 2003

Shore Club Condominium Association, Inc., a/k/a S.C. Condominium Association, Inc. *and* International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO

Case 12-CA-23262

September 30, 2003

DECISION AND ORDER

CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 7, 2003,[1] the General Counsel issued the complaint on August 22, 2003, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following

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1. The Respondent's answer to the complaint states that it is without knowledge as to the filing date, service, or mailing dates of the charge by the Union, and therefore denies this allegation. However, copies of the charge and affidavit of service are attached as Exhs. G and 1 to the General Counsel's motion and the Respondent has not contested the authenticity of these documents. Further, the Respondent admits that it received a copy of the charge. Accordingly, we find that the Respondent has not raised any issue regarding filing and service of the charge warranting a hearing. See, e.g., *Corrections Corp. of America*, 330 NLRB 663 (2000), enfd. 34 F.3d 1321 (D.C. Cir. 2000).

the Union's certification in Case 12-RC-8915. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On September 11, 2003, the General Counsel filed a Motion for Summary Judgment. On September 15, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and cross-motion for summary judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its contentions in the representation proceeding that the Board lacks jurisdiction and that the unit employees are in the domestic service of families and persons at their homes and, therefore, are not "employees" under Section 2(3) of the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that

would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Florida corporation, with an office and principal place of business located at 1910 North Ocean Drive, Ft. Lauderdale, Florida, has provided maintenance and security services to condominium owners, most of whom are residents, at a complex consisting of two residential buildings located at 1901 and 1905 North Ocean Drive, Ft. Lauderdale, Florida, and a recreational facility located at 1912 North Ocean Drive, Ft. Lauderdale, Florida. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of Florida.[3]

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2. The Respondent's cross-motion for summary judgment and request to dismiss the complaint are therefore denied.

3. The foregoing findings are consistent with the Regional Director's findings and the parties' stipulation in the representation proceeding.

Appendix B

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held April 17, 2003, the Union was certified on July 22, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by Respondent at its facility at Ft. Lauderdale, Florida excluding all office employees, security employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On various dates since about July 3, 2003, the Union has requested the Respondent to bargain, and, since about July 22, 2003, the Respondent has failed and refused. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Appendix B

Conclusions of Law

By failing and refusing on and after July 22, 2003, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.[4]

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in

4. We shall also order the Respondent to post the attached Notice to Employees. The General Counsel's complaint requests that the Respondent be ordered to post the Notice in English, Spanish, and Creole. However, the Respondent's answer generally denies that the requested relief is appropriate. Because there is no indication in the submitted record that the election notices in the underlying representation proceeding were posted in foreign languages, and the complaint or motion does not set forth any factual basis for posting the Notice in foreign languages, we shall leave to the compliance stage of this proceeding the determination of whether the Notice should also be posted in Spanish and Creole. See *Triple A Maintenance Corp.*, 283 NLRB 44, fn. 3 (1987).

good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Shore Club Condominium Association, Inc., a/k/a S.C. Condominium Association, Inc., Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Teamsters, Local Union No. 390. AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary, to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an

understanding is reached, embody the understanding in a signed agreement

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by Respondent at its facility, at Ft. Lauderdale, Florida excluding all office employees, security employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Ft. Lauderdale, Florida, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 2003.

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5. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix B

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 1003

Robert J. Battista	Chairman
Wilma B. Liebman	Member
Dennis P. Walsh	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Appendix B

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO as the exclusive representative of the employees in the bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employs, painters and cleaners, employed by us at our facility at Ft. Lauderdale, Florida excluding all office employees, security employees, guards and supervisors as defined in the Act.

SHORE CLUB CONDOMINIUM ASSN. A/K/A
S.C. CONDOMINIUM ASSN., INC.

APPENDIX C — REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12 DATED MAY 16, 2003

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

Case 12-RC-8915

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., a/k/a S.C. CONDOMINIUM ASSOCIATION, INC.[1]

Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO: 390, AFL-CIO[2]

Petitioner

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1. The name of the Employer appears as amended at the hearing.

2 The name of the Petitioner appears as amended at the hearing, and as further amended to reflect the correct name of the International Union, and its affiliation with the AFL-CIO. I have taken official notice of the correct name of the International Union and its affiliation with the AFL-CIO. See www.teamster.org/about/constitution/article_i_.htm and www.aflcio.org/aboutunions/unions/.

Appendix C

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Shore Club Condominium Association, Inc., also known as (a/k/a) S.C. Condominium Association, Inc. (the Employer) provides maintenance and security services to condominium owners, most of whom are residents, at a complex located in Fort Lauderdale, Florida. The complex consists of two residential buildings, located at 1901 North Ocean Drive (the South building) and 1905 North Ocean Drive (the East building), and a recreational facility at 1912 North Ocean Drive. There are 192 units in the two residential buildings, which are high rise towers located on the west side of Route A1A, i.e. across A1A from the Atlantic Ocean. The recreational area includes beach property, a recreational building and a pool.

International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO (the Petitioner) filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking certification as the collective bargaining representative of a unit of maintenance and security employees who "are really concierges," excluding office employees and management officials. A hearing in this matter was held before a hearing officer. Following the hearing, the parties each filed briefs with me.

The parties took different positions regarding the following issues:

(1) The Petitioner asserts that the Board has jurisdiction over the Employer's operations, whereas the Employer denies that it is engaged in commerce within the meaning of the

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National Labor Relations Act (the Act).

(2) The Employer refused to stipulate to the Petitioner's status as a labor organization. The Petitioner asserts that it is a labor organization within the meaning of Section 2(5) of the Act.

(3) The Petitioner contends that the petitioned-for employees are employees within the meaning of Section 2(3) of the Act,[3] whereas the Employer asserts that they are individuals employed in the domestic service of families or persons at their homes, and therefore that the petition should be dismissed. The Employer further argues, in effect, that the United States Constitution requires this conclusion.

(4) The Employer further contends that the security employees in the petitioned-for unit are employed as guards as set forth in Section 9(b)(3) of the Act (i.e. they are employed as guards to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the Employer's premises), and that, assuming for the sake of argument that the maintenance employees are employees within the meaning of the Act, the petitioned-for unit is inappropriate because it includes guards and non-guards. The Employer also asserts that under Section 9(b)(3) of the Act, the Petitioner cannot be certified as the representative of the Employer's security employees because it admits to membership employees other than guards. The

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3. The Petitioner also stated its willingness to proceed if the petitioned-for unit is found inappropriate and an alternative unit is found appropriate.

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Petitioner contends that the Employer's security employees are not guards.

(5) Finally, the Employer contends that the hearing officer made prejudicial errors in excluding certain documents and testimony, and, simultaneously with the filing of its post-hearing brief, the Employer filed a motion to reopen the record to introduce the employment application of an employee witness into evidence. The Petitioner has not replied to the Employer's motion.

I have considered the evidence and arguments presented by the parties on each of the issues. As discussed below, I conclude that the Board should assert jurisdiction over the Employer's operations; the Petitioner is a statutory labor organization; the Employer's employees are employees within the meaning of the Act and are not domestics; the employees who perform security functions are guards and should be excluded from the unit; the hearing officer's evidentiary rulings are free from prejudicial error; and the Employer's motion to reopen the record is denied. Accordingly, I have directed an election in a unit that consists of approximately five employees. To provide a context for my discussion of the issues, I will first provide the relevant factual background in this case. Then, I will present in detail the facts and reasoning that support each of my conclusions on the issues.

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RELEVANT FACTUAL BACKGROUND

The Employer has a board of directors, which is elected by the individual members and operates the condominium on their behalf. Most of the owners, or members, of the Employer live in the units they own, although there are 11 or 12 non-resident owners.

The Employer's resident manager reports directly to the board of directors, and supervises the Employer's entire staff on a day-to-day basis.[4] The resident manager occupies one of the 192 residential units and is available 24 hours a day, seven days a week. It appears that he functions like a building superintendent in an apartment complex.

The supervisor reports directly to the resident manager. There are six security employees who report to the supervisor and the resident manager. In addition, the Employer employs a main, or lead maintenance employee,[5] and four other maintenance employees, including one who functions primarily as a painter, and three cleaners who perform janitorial functions. The maintenance employees report to the resident manager.

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4. The parties stipulated, and I find, that Richard Thornton, the resident manager, and Kevin Noble, the supervisor (also referred to as the lead guard), are supervisors within the meaning of Section 2(11) of the Act inasmuch as they hire, fire or discipline employees, and that Shirley Peffer, office manager, has authority to discipline employees and is also a supervisor within the meaning of Section 2(11) of the Act.

5. There is no contention or evidence that the main, or lead, maintenance employee is a statutory supervisor.

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The complex has two security offices. The upper security office is glassed in and located at the top of the main entrance ramp to the complex, where there are security gates. It is staffed by a security employee at all times. The office contains seven electronic monitors, phones, and receivers from speakers in the garage. The monitors resemble small television screens and display views from cameras dispersed through the property. The cameras are always on. The upper security office employees continually monitor the gates and other areas of the property (including a tunnel under Route A1A, between the recreational area and the residential buildings) at all times, via motion detectors and via the security monitors in the upper security office.

The lower security office is located at the rear of the building and is also adjacent to an automatic gate entrance. There are no electronic monitors at that office.

Some residents may have personal security alarm systems installed in their units, but the Employer's security employees are not responsible for monitoring such personal security systems.

The Employer has maintained a security manual since about 1991. According to the resident manager, the security manual is issued to all newly hired security employees, who are required to read it. It is undisputed that copies of the security manual are maintained in the security offices for reference. However, one security employee, who has worked for the Employer in that capacity for a year, testified that he was never told to read the security manual, and has never referred to it.

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The security employees do not carry or have access to any weapons. The Employer does not require its security employees to be licensed or certified, or to have any specific skills other than proficiency in English. It prefers to hire security employees who have some security experience, experience in the hotel or motel industry, or other experience dealing with the public. The Employer checks references on applicants for security positions but does not call the police and ask for fingerprints. Similar reference checks may be made on applicants for maintenance employee (cleaner) positions. There is some evidence that newly hired upper gate security employees receive two days of on-the-job training from the supervisor, or lead guard, and newly hired lower gate security employees receive two days of on-the-job training from the lower gate security employee who works on the day shift. However, a security employee testified that his training consisted of a 45 minute tour of the property given by the supervisor, and instructions to greet guests, accept packages, call cabs for residents, and help residents with luggage from time to time, and that he never received any other training from the Employer. The same employee concedes that before working for the Employer he had substantial experience as a security guard working for security contractors.

Security employees working in the upper security office deal primarily with guests of residents, and package deliveries for residents, and observe the surveillance monitors. They announce the arrivals of guests to residents and will not allow the guests to enter without permission from the resident in question. They also keep logs of guest visits and direct guests as needed. In addition, they are the primary contact in emergency situations and are responsible for calling 911 or

calling the resident manager to report certain types of security incidents. They inform residents about the arrival of packages, and sometimes help residents with carrying packages to their units. Security employees also retain custody of a resident's package in the upper security office until the delivery can be made directly to the resident.

Security employees assigned to the lower security office deal primarily with contractors, delivery persons and other commercial visitors, who are required to park their vehicles at the rear of the premises, and who are not admitted without confirmation from the relevant resident to the security employees. Commercial visitors are given an identification badge (or sticker) that shows the building and unit which they are to visit. In addition, the security employees at the lower security office maintain a log showing the visiting worker's name, company name, time in and out, unit visited, and vehicle license. If such commercial visitors approach the upper gate or park in the upper garage, the security personnel at that location send them to the lower security office. The Employer's security employees require trades-people to leave its premises after 5:00 P.M., and also enforce the rule that guests may not use recreation facilities without permission.

After issuing the identification badge the security employee at the lower security office locks down the lower gate and escorts the commercial visitor to the appropriate elevator (which is key-operated) and directs him or her to the proper floor. If the visitor refuses to wear the badge, the security employee is to deny him entrance and call the supervisor. In addition, the security employees at the lower

gate are responsible for installing protective pads and flooring in elevators when needed to protect them from tools, equipment or other items being delivered or moved by commercial visitors.

Both security employees and maintenance employees wear radios to communicate with co-workers and supervisors. In case of emergency there is a phone at the recreation center, which calls directly into the upper security office. In the exercise room there is a button that lights up an exterior light placed so that it can be seen by the security employees through a glass plate from their normal workstation.

Security employees lock down the lower gates each night at about 9:00 p.m. At that point the security employee assigned to that location starts making rounds, checking all areas of the recreation center, going up elevators and to the roofs of the two residential, buildings. There is evidence that they make these rounds two times during a typical night shift. When security employees see trespassers during their rounds, the trespassers are often residents of neighboring properties, using the Employer's property as a shortcut. In those instances, the security employees simply file an incident report and permit the trespasser to continue. However, if the trespasser is someone unknown to the security employee, the security employee is to ask the trespasser to leave the premises. If they refuse, the security employee files an incident report and notifies the resident manager, but is not supposed to physically force the trespasser to leave.

Security staff is responsible for filing incident reports regarding any problems or breaches of the condominium rules

and regulations. These may range from domestic disturbances to vandalism to relatively minor matters such as a pickup truck parked in the upper garage, or a trespasser on a bicycle. Upper level security employees are also responsible for calling 911 as needed. However, it appears that most often security employees simply report incidents to the resident manager.

The resident manager recalls only three incidents during his 22 months on the job when the police were called to the Employer's premises, two times as a result of deaths, and once because of damage to a light. The resident manager was personally involved in all three of these calls, and it does not appear that security employees made any of these calls.

The recreation center is locked but residents have access using a key, which also provides access to certain elevators and the front entrances of the two residential towers. The security guards carry a master key that allows access to almost all areas. The security employees also hold certain keys, including those for locks on chains restricting access to the Employer's grilling facilities. However, security employees do not have access to the individual residents' units and they may only enter individual units when accompanied by their supervisor.

The resident manager testified that apart from the occasional courtesy assistance to residents, for example with a heavy package, security guards perform only security functions. In specific they do not perform concierge functions

such as identifying dining and entertainment options, securing reservations and such, and although they may occasionally get a cab for a resident this is not part of their job. A security employee testified that he calls cabs for residents about two or three times a Week, that he was told that was part of his job, and that he has assisted residents with packages on about 40 occasions, although in most instances, he merely delivers the packages a short distance from the security office to the resident's car.

The only cleaning or maintenance function performed by the Employer's security employees, is to clean occasional messes when no maintenance employee is on duty and to keep the security offices neat. There is no evidence that security employees ever substitute for maintenance employees.

The security staff wears white shirts with the Employer's logo on one sleeve, and their names on the other, and black pants. This is distinct from the maintenance employees' dark khaki uniforms. The security employees do not wear any marking or badge which identifies them as security guards.

The duties of the maintenance employees are distinct from those of security employees, although on rare occasions the main maintenance employee has worked as a substitute security employee for a portion of a day. The "main" maintenance employee does most of the installation and repairs of equipment and lighting and pool heaters, and performs indoor repairs and other maintenance work. Occasionally he needs to enter residential units to perform maintenance on air conditioning drain lines and condensation

lines. A second maintenance employee spends 90 to 95 percent of his time painting outside. Occasionally, he performs work inside residential units for individual residents, and is compensated directly by those individuals. However, the painter is on his own time and is not working for the Employer when he performs work for an individual resident. The three maintenance employees who work as cleaners are primarily assigned to the South building, the East building and the recreational facility, respectively. Their, duties include cleaning elevators, lobbies, catwalks, and stairwells, i.e. common areas, and carrying recycling. They share some responsibilities for the common areas.

Security employees earn between about $7.75 per hour and $8.50 per hour. Maintenance employees earn comparable wages, except for the main maintenance employee, whose wages are considerably higher. All employees receive similar health insurance and other benefits.

The upper security office employees work the following shifts: from 6:30 a.m. to 2:30 p.m., from 2:30 p.m. to 10:30 p.m., and from 10:30 p.m. to 6:30 a.m. seven days a week. The lower security office employees work from 8:00 a.m. to 4:00 p.m. and from 4:00 p.m. to midnight, Mondays to Fridays, and from 8:00 a.m. to 1:00 p.m. on Saturdays. The lower gate is locked at other times. Maintenance employees cover the hours from 7:30 a.m. to 6:00 p.m. weekdays and from 6:30 a.m. to 2:30 p.m. on weekends, except for the main maintenance employee, who works from 8:00 a.m. to 3:30 p.m. on Saturdays. The resident manager usually performs any maintenance work, which needs to be done when there are no other maintenance employees on duty. Occasionally the supervisor assists him in this work.

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THE BOARD HAS JURISDICTION OVER THE EMPLOYER.

The parties stipulated that the Employer is a Florida corporation with its principal place of business located at 1910 North Ocean Drive, Fort Lauderdale, Florida, where it is engaged in the business of providing maintenance and security of residents, and that during the past 12 months, a representative period of time the Employer, in the course and conduct of its operations, derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Employer refused to stipulate to the conclusion that it is an employer engaged in commerce within the meaning of the Act. However, the Board has long held that it has jurisdiction over the operations of residential condominiums and cooperatives, which have gross annual revenues in excess of $500,000 and more than de minimis interstate commerce. *30 Sutton Place*, 240 NLRB 752 (1979); *Imperial House Condominium*, 279 NLRB 1225 (1986), affd. 831 F.2d 999 (11th Cir. 1987); *Riverdale Manor Owners Corp.*, 311 NLRB 1094, fn. 1 (1993).

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THE PETITIONER IS A LABOR ORGANIZATION WITHIN THE MEANING OF SECTION 2(5) OF THE ACT.

The record evidence establishes that the Petitioner represents employees for the purpose of collectively bargaining with employers as the exclusive representative of employees with respect to wages, hours and other terms and conditions of employment. Thus, the Petitioner has a number of collective-bargaining agreements with employers, which it administers on behalf of employees. It is further undisputed that the Petitioner admits employees to membership and that employees participate in the Petitioner's affairs by, among other things, attending meetings of its Executive Board and participating in collective-bargaining negotiations with employers. Based on all of the above I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

THE PETITIONED–FOR UNIT CONSISTS OF EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT RATHER THAN INDIVIDUALS EMPLOYED IN DOMESTIC SERVICE.

On this issue the Employer also seeks to overturn years of settled Board precedent, arguing that condominium employees are individuals employed in the domestic service of a family or person at his home. As established by the record in this case, the condominium employees work for the entire condominium association, rather than for any individual unit owner. The employees perform the vast majority of their work in common areas of the complex, which consists of 192 units and has substantial amenities such as recreational, parking,

security and maintenance services. On the rare occasions that the employees must enter individual units to perform their duties on behalf of the Employer, it is clearly to perform work on behalf of the condominium association as a whole, rather than as employees of an individual unit owner.

As the Board held in *30 Sutton Place Corporation*, 240 NLRB 752, 753 (1979):

> [U]nlike individual homeowners, present-day condominiums and cooperatives, consisting of numerous owners acting in concert to manage and maintain their collective properties, are engaged in business having a significant impact on interstate commerce. Accordingly, condominiums and cooperatives fall within the Act's jurisdictional mandate.

The Board's decision in *Ankh Services. Inc.*, 243 NLRB 478 (1979), further supports the conclusion that the Employer's employees are employees within the meaning of the Act rather than domestics, because the Employer consists of a condominium association rather than an individual homeowner or resident:

> Here we are not presented with a few individuals who are employed by the homeowner or resident of the home in which they perform their domestic services. Rather we are presented with a stipulated unit of approximately 40 persons, each of whom works from time to time in the homes or residences of numerous clients and all of whom

> are employed by the Employer and not by the clients. Thus **our focus is on the principals to whom the employer-employee relationship in fact runs and not merely on the undisputedly "domestic" nature of some of the services rendered.**

Ankh Services, Inc., 243 NLRB at 480 (emphasis supplied, footnotes omitted); see also *Imperial House Condominium*, 279 NLRB 1225 (1986), affd. 831 F.2d 999 (11th Cir. 1987).

The Employer also contends that application of the Act to its employees would be unconstitutional because it would ignore the concepts of state sovereignty and federalism, in that the Florida state constitution and state statutes enable the use of a condominium legal structure and recognize condominium owners' right to claim a homestead exemption from taxes, and therefore the employees of a condominium are domestics and are not employees within the meaning of the Act. This strained argument does not withstand scrutiny. A finding that the employees of a condominium association are covered by the Act does not in any manner prevent the organization of condominium associations or negate the right of individual condominium owners to claim a homestead exemption under the Florida state constitution. Florida's sovereignty is not jeopardized by the Federal Government exercising jurisdiction over employees who are employed by an entity (a condominium), which is a creature of state law. Indeed all corporations are, in a sense, creatures of the states which incorporate them, but this does not preclude the assertion of federal jurisdiction over a corporation's employees and its labor relations.

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I also find the Employer's claims that the assertion of jurisdiction over its employees would lead to an assortment of other violations of the United States Constitution to be without merit. The Employer contends that: (1) if the Petitioner demanded money (from the Employer – presumably economic demands in collective-bargaining negotiations) and the Act was interpreted to allow a strike, this would be a "taking" of the homeowners' property; (2) if the Petitioner demanded information this could be an unlawful search; (3) by striking the Petitioner could prevent someone from living in their own home thus constituting cruel and unusual punishment; and (4) the Petitioner could interfere in homeowners' rights in a manner inconsistent with due process and equal protection. However, these purported consequences do not flow from the Board's mere recognition of the rights of the Employer's employees under the Act, and of course, if the Petitioner was certified as the employees' representative, there would be limits on its rights under the Act.[6]

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6. Similarly, the policy arguments raised by the Employer in its brief are without merit.

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THE SECURITY EMPLOYEES ARE GUARDS WITHIN THE MEANING OF SECTION 9(b)(3) OF THE ACT AND MAY NOT BE INCLUDED IN A UNIT WITH THE EMPLOYER'S NON-GUARD EMPLOYEES.

THE PETITIONER MAY NOT BE CERTIFIED AS THE BARGAINING AGENT OF THE EMPLOYER'S SECURITY EMPLOYEES BECAUSE IT ADMITS NON-GUARDS TO MEMBERSHIP.

The Employer contends that the security personnel are guards as defined in the Act. The Petitioner contends that they are "concierges" and are not guards.

Section 9(b)(3) of the Act provides that the Board shall not:

> decide that any unit is appropriate . . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the Employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

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A petition for employees found to be guards will be dismissed when the union, which seeks to represent them, has members who are not guards. *A.D.T. Co.*, 112 NLRB 80 (1955); *Brinks Incorporated of Florida*, 276 NLRB 1 (1985). It is undisputed that the Petitioner admits non-guards to membership. Accordingly, the real issue is whether the Employer's security employees meet the statutory definition of a guard.

In general the board and the Courts have held that employees are guards where their security function (enforcing safety and protection rules and regulations) is an essential rather than an incidental part of their duties and responsibilities. See *McDonnell Aircraft Co. v. NLRB*, 827 F2d. 324 (1987) (fire prevention workers); Baker Protective Services, 289 NLRB 562 (1988) (service technicians); *A.W. Schlesinger Geriatric Center* 267 NLRB 1363 (1983) (maintenance workers).

The Board has consistently found that an employee need not be in uniform or armed to be deemed a guard. Thus a janitor who monitored security cameras and checked people in at a security gate was found to be a guard. *PECO Energy Co.*, 322 NLRB 1074 (1997). Plainclothes security employees were included in a unit with uniformed guards, where the latter performed a range of traditional police functions. *Burns Security Systems*, 188 NLRB 222 (1971). In *Madison Square Garden*, 333 NLRB No. 77 (2001), the Board found that certain supervisors of event staff employees were guards within the meaning of the Act where the supervisors constituted an "essential part" of an employer's security procedures and regularly performed security functions, which required them to enforce rules against patrons and staff, and to protect the employer's facility, patrons and staff.

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The Petitioner seeks to show that the security employees in this case are not guards within the Act but instead perform a kind of concierge function. Petitioner cites *55 Liberty Owners Corp.*, 318 NLRB 308 (1995) as being particularly close to the instant facts. In *55 Liberty Owners* the Board found certain doorpersons and elevator operators were not guards although the doorpersons were expected to monitor surveillance monitors connected to cameras. The Board found their guard functions to be incidental to their other responsibilities.

> The doorpersons and elevator operators **do not make rounds**, are not trained in security, are not armed, are instructed not to use physical force, and do not present themselves as guards in their appearance. They do not perform other guard-like functions such as checking suspicious packages or asking off-duty employees to leave. Their guard-like functions of asking unauthorized persons to leave (or enforcing in some manner the no loitering and no-smoking rules) . . . are **incidental** to their primary non-guard duties and there is **no evidence that the doorpersons enforce rules against employees or other persons to protect the safety of persons on the premises or the property itself**.

55 Liberty Owners Corp. at 310 (emphasis added).

Contrary to the facts in *55 Liberty Owners*, in the instant case it appears that it is the non-guard duties which are incidental to the security employees' main guard functions

including making regular rounds and enforcing rules for the protection of residents and guests. Although the instant case is somewhat similar to the facts in *55 Liberty Owners* because the employees in question did announce visitors, delivery persons and contractors to residents, the employees in that case did not provide visitors with identification tags, or check on their whereabouts after 5:00 p.m. as the Employer's security employees do. Moreover, in addition to performing certain courtesy functions performed by the Employer's security employees, such as announcing visitors, accepting packages and mail, and carrying baggage on occasion, the employees in *55 Liberty Owners* were expected to greet and open doors for residents. These duties are more akin to "courtesy oriented and receptionist type" services than the duties regularly performed by the Employer's security employees.

Petitioner also cites *Ford Motor Company*, 116 NLRB 1995 (1956) where the Board found that a receptionist was not a guard. However, in that case, unlike the instant case, the receptionist did not monitor security cameras or motion detectors, make rounds, or take independent steps to enforce security rules against visitors or guests. In making its finding in *Ford Motor Company*, the Board relied on the fact that the receptionist needed to call in plant guards to enforce the security policies.

In the instant case the security employees are the only ones performing guard functions and they call either their manager or 911 depending on the situation. Indeed they are the only employees performing any kind of security function.

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Wolverine Dispatch, Inc., 321 NLRB 796 (1996), another case where a receptionist was not found to be a guard despite performing similar guard functions to the guards in the instant case, is also distinguishable because the receptionist's guard duties related solely to controlling entry to the front lobby, and they primarily involved secretarial and administrative duties, such as taking notes at meetings, doing clerical computer entry and arranging for employees' uniforms.

The security employees in the instant case more closely resemble the employees found to be guards in *Rhode Island Hospital*, 313 NLRB 343, 345-347 (1993) (security dispatchers were guards because they monitored closed circuit TV systems, were directly responsible for being alert to any incident, situation, or problem which needs responsive action and for reporting such incidents to the proper authorities); *MGM Grand Hotel*, 274 NLRB 139, 140 (1985) (the operators of a security system served to monitor and report possible security problems and infractions and possible life-endangering situations, even where other, armed security guards were primarily responsible for enforcing security and compliance with rules); *AW Schlesinger Geriatric Center*, 267 NLRB 1363 (1983) (security employees at a residence for the aged had no training, weapons, or uniforms, and continued to perform maintenance functions, but sometimes confronted trespassers and devoted 50 to 70 percent of their time to security work); *Crossroads Community Correctional Center*, 308 NLRB 558, 562 (1992) (employees at an inmate work release program were found to be guards even though they were told not to use physical force but to call the police or supervisors; they had no specific training, uniforms, or weapons; and they accompanied residents who were going

out to work, prepared reports on property damage, checked for fire hazards and contraband possessions, received calls, and received packages).

Based on the above, I find that the Employer's security employees are guards within the meaning of Section 9(b)(3) of the Act, and should be excluded from the unit sought by the Petitioner.

THE HEARING OFFICER'S EXCLUSION OF EVIDENCE WAS PROPER AND DOES NOT CONSTITUTE PREJUDICIAL ERROR. THE EMPLOYER'S MOTION TO REOPEN THE RECORD IS DENIED.

The Employer complains that the hearing officer improperly precluded it from introducing certain evidence. The Employer's contentions are without merit.

The Employer's attempt to engage in a detailed examination of the employment experience of a security employee before he worked for the Employer was correctly deemed irrelevant by the hearing officer. As the hearing, officer correctly found, the relevant inquiry concerned the witness' employment with the Employer, rather than his previous employment. Moreover, the hearing officer afforded the Employer substantial latitude in cross-examining the witness with respect to his previous employment before making her ruling. In addition, the Employer's motion to reopen the record to introduce that same witness' application for employment with the Employer to show that he applied for a security position, rather than for "any position," as he

testified, is denied. The Employer has made no showing or claim that the application in question was newly discovered or was unavailable at the time of the hearing, as is required pursuant to Section 102.65(e)(1) of the Board's Rules and Regulations. Yet, the Employer failed to file its motion or offer the application in evidence until it filed its brief in this matter, two weeks after the hearing.

With respect to the Employer's claim that the hearing officer improperly precluded its questioning of the Petitioner's agent as to whether he was a condominium owner and as to the Petitioner's potential representation of the petitioned-for unit, it appears from the Employer's brief and arguments at the hearing that the Employer was engaged in pure speculation that the Petitioner's agent may be a condominium owner. Accordingly, I find that the hearing officer properly precluded the Employer from pursuing that line of questioning.

Finally, the Employer claims that the hearing officer should have permitted it to introduce in evidence the portion of Employer Exhibit 7, which consists of approximately 112 pages of condominium documents.[7] However, when the hearing officer attempted to ascertain which portion of the lengthy document the Employer sought to rely upon, counsel for the Employer refused to specify any portion. Therefore, the hearing officer properly rejected the exhibit and placed it in a rejected exhibit file. Moreover, in his brief, counsel for the Employer cites the rejected exhibit only for the

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7. The portion of Employer Exhibit 7 consisting of the Employer's articles of incorporation was admitted in evidence.

proposition that a condominium owner cannot sell or lease his or her unit without the permission of the other owners. However, the President of the Employer's Board of Directors testified to this very point and his testimony was undisputed. Accordingly, I have considered this evidence in reaching the above conclusions.

For the foregoing reasons, I find that all of the Employer's assertions that the hearing officer committed prejudicial error are without merit, and the Employer's motion to reopen the record is denied.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, a labor organization, seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate[8] for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by the Employer at its facility at Ft. Lauderdale, Florida, excluding all office employees, security employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among employees in the unit found appropriate above. The employees will vote on the question of whether or not they wish to be represented by the International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO for the purposes of collective bargaining. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this decision.

A. *Voter Eligibility*

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately

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8. As noted above, at the hearing the Petitioner indicated that it wished to proceed to an election in an alternative unit if the petitioned-for unit was found inappropriate.

before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. *Employer to Submit List of Eligible Voters*

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

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Accordingly it is hereby directed that within 7 days of this Decision; the Employer must submit to the Regional Office, an election eligibility list, containing the full names and addresses of all the eligible-voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Boulevard, Suite 530, Tampa, Florida 33602-5824, on or before May 23rd, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. If you have any questions, please contact the Regional Office.

C. *Notice of Posting Obligations*

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuously visible to potential voters for a minimum of 3 full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration*

Services, 317 NLRB 349 (1995). An employer who fails to do so may not file objections based on the non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST, on May 30, 2003. This request may not be filed by facsimile.

DATED at Tampa, Florida, this 16th day of May 2003.

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, FL 33602

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No. 04-1603

In the Supreme Court of the United States

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., AKA SC CONDOMINIUM ASSOCIATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ARTHUR F. ROSENFELD
Acting General Counsel
JOHN E. HIGGINS, JR..
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA J. DREEBEN
Assistant General Counsel
ANNE MARIE LOFASO
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably found that individuals employed to perform maintenance work in the common areas of a condominium complex were employees under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and not excluded from the Act's coverage as "employed * * * in the domestic service of any family or person at his home" under that section.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 400 F.3d 1336. The decision and order of the National Labor Relations Board (Pet. App. 9a-17a) is reported at 340 N.L.R.B. No. 82. The decision and direction of election of the Board's regional director for Region 12 (Pet. App. 18a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2005. The petition for a writ of certiorari was filed on May 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(3) of the National Labor Relations Act (NLRA or Act) defines "employee" for purposes of the Act. That definition excludes "any individual employed * * * in the domestic service of any family or person at his home." 29 U.S.C. 152(3).

In determining whether an employee is "employed * * * in the domestic service of any family or person at his home" under Section 2(3), the National Labor Relations Board focuses "on the principals to whom the employer-employee relationship *in fact* runs and not merely on the * * * 'domestic' nature of * * * the services rendered." *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 480 (1979). The Board, with judicial approval, has held that workers performing maintenance and cleaning work at a condominium are not employed "in the domestic service of any family or person at his home," where they perform those services "on behalf of and are clearly employed by" the incorporated condominium association. See *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d 999, 1005 (11th Cir. 1987).

2. Petitioner is a nonprofit Florida corporation that provides maintenance and security services to condominium owners at a condominium complex consisting of two high rise residential buildings, which have a total of 192 condominium units, and one recreational facility. Pet. App. 2a, 11a, 19a, 30a. Petitioner is controlled by a board of directors, which is elected by the owners of the condominium units. *Id.* at 22a. A resident manager supervises petitioner's entire staff and reports directly to the board of directors. *Ibid.* He functions like a building superintendent in an apartment complex and is available 24 hours a day, seven days a week. *Ibid.*

Petitioner employs five maintenance employees, including one lead maintenance worker, one painter, and three janitors, all of whom report to the resident manager. Pet. App. 22a. They wear dark khaki uniforms, *id.* at 28a, and use radios to communicate with one another, *id.* at 26a. The lead maintenance employee is responsible for installing, repairing, and maintaining equipment, such as lighting and pool heaters, in the common areas of the building. *Id.* at 5a, 28a. Occasionally he enters residential units to perform work on behalf of petitioner, such as maintenance on air conditioning drain lines and condensation lines. *Id.* at 5a, 28a, 32a. The painter spends 90 to 95% of his time painting outside. On his own time, he may perform work inside residential units and receive payment directly from the individual resident. *Id.* at 29a. Each of the three janitors is assigned to one of the three buildings. The janitors spend their time carrying recycling materials and cleaning common areas, such as the elevators, lobbies, catwalk, and stairwells. *Ibid.*

3. On April 3, 2003, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 390, AFL-CIO (Union), filed a petition with the Board seeking certification as the collective-bargaining representative of petitioner's five maintenance employees.[1] Pet. App. 2a. Petitioner opposed the Union's election petition, claiming, *inter alia*,

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[1] The Union's petition sought to include petitioner's security employees in the bargaining unit. The Board's regional director concluded that those security employees were guards, who, under Section 9(b)(3) of the NLRA, 29 U.S.C. 159(b)(3), could not be represented in a unit that included nonguards. Pet. App. 35a-40a. The Union did not contest that ruling. The status of petitioner's security employees was therefore not before the court of appeals and is not before this Court.

that the petitioned-for unit was inappropriate, because the maintenance employees were employed in the domestic service of families or persons at their homes and therefore excluded by Section 2(3) of the Act. *Ibid.*

Following a hearing, the Board's regional director issued a decision, finding, in relevant part, that petitioner's maintenance employees were covered by the Act and directing an election in a unit of "[a]ll full-time and regular part-time maintenance employees * * * employed by [petitioner] at its facility in Ft. Lauderdale, Florida." Pet. App. 3a, 12a, 43a. In finding that the five maintenance workers were not individuals "employed * * * in the domestic service of any family or person at his home," the regional director "focus[ed] * * * on the principals to whom the employer-employee relationship in fact runs." Pet. App. 33a (quoting *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 480 (1979), and citing *Imperial House Condominium*, 279 N.L.R.B. 1225 (1968), aff'd, 831 F.2d 999 (11th Cir. 1987)). The regional director observed that "[t]he employees perform the vast majority of their work in common areas of the complex," Pet. App. 31a, and that when they enter individual units on rare occasions to perform maintenance on air conditioning lines, they perform work on behalf of petitioner, and not as employees of individual unit owners. *Id.* at 29a, 32a. The regional director concluded that the five maintenance employees "work for the entire condominium association, rather than for any individual unit owner." *Id.* at 31a.

The regional director rejected petitioner's contention that applying the Act to its maintenance employees would violate principles of state sovereignty and federalism because the State recognizes the use of the condominium legal structure and permits condominium own-

ers to claim a homestead exemption on their state tax returns. Pet. App. 33a. The regional director explained that application of the Act would neither prevent the organization of condominium associations nor preclude individual condominium owners from claiming a homestead exemption under the Florida state constitution. *Ibid.* The regional director further explained that "Florida's sovereignty is not jeopardized by the Federal Government exercising jurisdiction over employees who are employed by an entity (a condominium), which is a creature of state law." *Ibid.* The regional director noted that corporations, like condominiums, are "creatures of the state which incorporate[s] them, but this does not preclude the assertion of federal jurisdiction over a corporation's employees and its labor relations." *Ibid.* Rejecting petitioner's remaining constitutional claims, based on the Fourth and Fifth Amendments, the regional director found that the Board's recognition of the rights of employees would not itself result in any of the consequences—such as a taking of the owners' property or the imposition by the government of "cruel and unusual punishment"—that petitioner claimed would violate its constitutional rights. *Id.* at 34a. The Board subsequently denied petitioner's request for review of the regional director's decision and direction of election. *Id.* at 3a.

On June 11, 2003, the regional director conducted a secret-ballot election in the specified unit. Pet. App. 3a. By a 5-0 vote, the Union won the election. *Ibid.* The regional director then certified the Union as the exclusive collective-bargaining representative of petitioner's maintenance employees. *Id.* at 3a, 12a, 43a.

When petitioner subsequently refused to bargain, the Union filed an unfair labor practice charge. Pet. App.

3a, 12a. The Board's General Counsel issued a complaint, alleging that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 3a. Finding that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding, the Board granted summary judgment, decreeing that petitioner had violated Section 8(a)(5) and (1) of the Act, and ordered petitioner to bargain on request with the Union. *Id.* at 10a-13a.

4. Petitioner filed a petition for review in the court of appeals, and the Board filed a cross-application for enforcement of its order. The court of appeals denied the petition for review and enforced the Board's bargaining order. Pet. App. 1a-8a.

The court of appeals upheld the Board's determination that petitioner's maintenance workers did not fall within the "domestic service" exemption of Section 2(3), relying on its prior decision in *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d 999, 1001, 1005 (11th Cir. 1987). In that case, the court had held that employees involved in housekeeping activities at a condominium were not exempt as "domestic" employees, because they were not employed by owners of condominium units to whom the housekeepers rendered services, but performed their services "on behalf of and are clearly employed by the Condominium, a Florida corporation." *Ibid.* Noting the evidence that the five maintenance workers employed by petitioner similarly work almost exclusively in the common areas, the court held that substantial evidence supported the Board's finding "that the employees at issue in this case are employed by the Association, rather than the individual unit owners," and that therefore the Board "was warranted in holding that

these employees are not exempt from the Act because they are not domestic employees within the meaning of Section 2(3)." Pet. App. 7a.

The court summarily rejected petitioner's contention that this Court's decision in *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), required a different result. Pet. App. 7a. The court also summarily rejected petitioner's constitutional arguments. *Id.* at 7a-9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. As this Court has recognized, the Board's interpretation of the term "employee" in Section 2(3) of the Act is entitled to deference if it is based on a reasonable construction of the statute. *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398-399, 409 (1996) ("appropriate weight * * * must be given to the judgment of the agency whose special duty is to apply th[e] broad statutory language to varying fact patterns") (citing *Bayside Enters., Inc.* v. *NLRB*, 429 U.S. 298, 304 (1977)); see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 437, 843 (1984). As this Court has further recognized, the Board and reviewing courts "must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.*, 517 U.S. at 399. Consistent with those principles, the court of appeals correctly affirmed the Board's determination that the maintenance employees employed by the condominium association are "employee[s]" and are not "employed

* * * in the domestic service of any family or person at his home" under Section 2(3) of the Act.

a. The Board, in its few decisions construing the domestic employee exemption of Section 2(3), has consistently focused on the employment relationship by examining the "principals to whom the employer-employee relationship in fact runs," or, in other words, who employs the workers. *Ankh Servs.*, 243 N.L.R.B. at 480. The Eleventh Circuit, the only court of appeals to review a decision involving the domestic employee exemption, previously affirmed a Board determination that the domestic service exemption does not cover employees who were not employed by individual condominium unit owners but were instead employed by the condominium association, a corporate entity. *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d at 1005. The court observed that the Board's focus accurately characterized "the true economic relationship existing between the employers and employees." *Ibid.*[2] The court of appeals' conclusion here (Pet. App. 7a) is fully consistent with that precedent.

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[2] The very limited legislative history of the exemption supports the approach taken by the Board and approved by the Eleventh Circuit. In *Ankh Services*, the Board noted that Congress stated that it meant only to exclude "domestic servants" from the NLRA. 243 N.L.R.B. at 480 & n.17 (quoting S. Rep. No. 1184, 73d Cong., 2d sess. 1, 3 (1934)). The Board further observed that "Congress did not * * * elaborate on the term 'domestic servant' nor did it define the scope of any particular employment relationship it may have intended to exempt from the operation of the Act." *Ibid.* Nor did Congress indicate an intent to exclude from coverage "any other than those individuals whose employment falls within the commonly accepted meaning of the term 'domestic servant.'" *Id.* at 480.

b. Contrary to petitioner's claim (Pet. 9-11, 18), the Board's overruled decision in *Point East Condominium Owners Ass'n*, 193 N.L.R.B. 6 (1971), does not support its argument that the Board erred in finding the domestic employee exemption inapplicable to petitioner's employees. In *Point East*, the Board declined to exercise discretionary jurisdiction over a condominium association because the Board determined that none of its existing jurisdictional standards applied. In particular, the Board found that its standard for asserting jurisdiction over retail establishments was inappropriate for condominiums because the employer association provided no services to persons other than the owners, and therefore was not clearly engaged in the sale of a service. *Id.* at 6. See *Leisure Village Ass'n*, 236 N.L.R.B. 102, 102 n.3 (1978) (clarifying *Point East* as holding that the Board had not yet "established a standard governing exercise of its jurisdiction over enterprises engaged in managing and maintaining condominiums").

When subsequently presented with "an exhaustive collection of data and analysis" prepared by the Department of Housing and Urban Development showing the accelerated growth of condominiums and their prominent role as a housing resource, however, the Board concluded that condominiums "are engaged in the business of concerted home management and maintenance." *30 Sutton Place*, 240 N.L.R.B. 752, 752-753 (1979). The Board further found that "this business had a substantial impact on interstate commerce, warranting our assertion of jurisdiction," so that employees of condominiums and the entities themselves "when acting as employers, may invoke the rights and privileges of the Act." *Id.* at 753 (overruling *Point East* to the extent it was inconsistent with *30 Sutton Place*).

In reaching that conclusion, the Board reasonably determined that the domestic employee exemption did not preclude its assertion of jurisdiction, because there was a substantial difference between employment by a single homeowner, where an individual and personal relationship is created, and employment by a condominium entity, which is similar to employment at an apartment house. 240 N.L.R.B at 753 n.6. The Eleventh Circuit in *Imperial House Condominium* endorsed the Board's reasoning in the specific context of a condominium association incorporated under Florida law. 831 F.2d at 1004-1005.[3]

2. The court of appeals correctly rejected petitioner's suggestion (Pet. 17-18) that the decision in this case conflicts with this Court's decision in *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). *Kentucky River* addressed Section 2(11) of the NLRA, 29 U.S.C. 152(11), which defines the term "supervisor," another category that Section 2(3) excludes from the definition of employee.[4] The Court held that the Board's

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[3] Petitioner relies (Pet. 13-15) on the dissenting opinion of two Board members in the Board's *Imperial House* decision, which advocated a return to *Point East*. See 279 N.L.R.B. at 1228. Even the dissent in *Imperial House*, however, recognized that nothing in the NLRA precluded the Board's assertion of jurisdiction over condominiums and disclaimed any argument that condominium employees are "domestic employees." *Id.* at 1228-1229.

[4] Section 2(3) provides that the term employee "shall not include * * * any individual employed as a supervisor." Section 2(11) states that "[t]he term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

interpretation of the term "independent judgment," which Section 2(11) uses to define who is a "supervisor," to exclude a particular kind of judgment—namely, professional or technical judgment in directing less skilled employees—inserted a "startling categorical exclusion into statutory text that does not suggest its existence." 532 U.S. at 713-714. The Court also held that the Board's application of its definition only when such judgment was used "in directing" less skilled employees was directly contrary to the statutory text, which ties the use of independent judgment to twelve distinct functions, such as hiring, transferring, suspending, laying off, etc. *Id.* at 715-716.

Those determinations about the Section 2(11) phrase "independent judgment" have no bearing on Section 2(3)'s exclusion of individuals "employed * * * in the domestic service of any family or person at his home." Unlike in *Kentucky River*, there is no conflict between the language of Section 2(3) excluding individuals employed in domestic service and the Board's conclusion, affirmed by the court of appeals, that the exclusion does not apply to petitioner's employees.

3. The court of appeals also correctly rejected petitioner's constitutional arguments. See Pet. App. 7a-8a. Petitioner argues (Pet. 18) that applying the NLRA to its employees would "violate[] State sovereignty." As the regional director explained in rejecting that contention, however, the finding that petitioner's employees are covered by the Act does not prevent the organization of condominium associations or preclude individual con-

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exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

dominium owners from claiming the State's homestead exemption. Pet. App. 33a.[5]

Petitioner's contention (Pet. 21-22) that applying the Act to its employees would violate various constitutional provisions is also mistaken. For example, petitioner contends (Pet. 21) that a union might go on strike, and that such a strike would amount to a "taking" under the Just Compensation Clause or a "denial of due process, in violation of the Fifth Amendment (insofar as the NLRB would be authorizing such a result)." Pet. 22. None of the hypothetical situations petitioner posits (Pet. 21-22) appear to raise any constitutional issue. They do not involve state action and, for the most part, would not in any event constitute the kind of conduct forbidden by the Constitution. In addition, any now-hypothetical constitutional claims petitioner may have could be asserted if and when the strike or other union activity posited by petitioner in fact materialized. At present, all that is at issue is the recognition of the Union as the exclusive representative of petitioner's employees. There is nothing in that recognition that presents any constitutional issue.

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[5] Petitioner is mistaken (Pet. 19-20) in contending that *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), has anything to do with this case. In *Federal Maritime Commission*, this Court held that state sovereign immunity barred the Federal Maritime Commission from adjudicating a private party's complaint *against a state port authority* that the state-run port violated the Shipping Act of 1984. Petitioner is a private employer and not an arm of the State of Florida. Petitioner is therefore not entitled to state sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ARTHUR F. ROSENFELD
Acting General Counsel
JOHN E. HIGGINS, JR..
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA J. DREEBEN
Assistant General Counsel
ANNE MARIE LOFASO
Attorney
National Labor Relations Board

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